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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1335. 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

against

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Opinions Below.

The opinions of the Circuit Court of Appeals (58-66) are reported in 147 Fed. (2d) 777 (C. C. A. 2nd, 1945). The opinion of the District Court (48-51) is reported in 59 Fed. Supp. 98 (S. D. N. Y., 1944).

The Petitioners Have No Valid Ground for Their Application for Writ of Certiorari.

The petitioners contend that the leading case of *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1933) on the subject of *forum non conveniens* has been the subject of doubt in

the lower federal courts. An analysis of that case and others cited by the petitioners demonstrates that the principle of law is not in doubt. The doubt in the *Rogers* case pertained to the application of the rule to the peculiar state of facts therein involved and not as to the law.

That principle was reiterated in the later case of *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935), wherein Mr. Justice Stone said (p. 185):

> "It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state."

This action involves the distribution of surplus earnings, analogous to dividends, of a foreign corporation. The Class B Debentures are the junior equity security of the corporation. If is settled law that such a matter is an internal affair of the corporation, justifying the District Court in exercising its discretion to decline jurisdiction.

Statement of the Case.

The respondent respectfully prays that this Court deny the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York.

The judgment so appealed from dismissed the complaint for lack of jurisdiction of the subject matter in that the subject matter is concerned with the internal affairs of the defendant-respondent, a foreign corporation, without prejudice to the institution of the action in Wisconsin.

The Nature of the Complaint.

The petitioners are some of the holders of the Class B debentures, issued by the defendant-respondent.

The gist of the complaint is described by Mr. William F. Unger, one of the petitioners' attorneys, as follows:

> "The action is brought * * * to recover the amounts payable on such debentures in lieu of interest and to compel a distribution of earnings in accordance with the provisions of the defendant's Articles of Incorporation and the debentures issued thereunder" (26, 27).

Judge Caffey in the District Court stated the nature of the action to be as follows:

> "In other words, among other things, the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures which, without permitting discretion to be exercised by the directors, would force the defendant to pay to the B holders all surplus earnings for each year since 1924 after annually paying the holders of the common stock and of the A debentures 5% of the face thereof.
>
> "It seems to me manifest that the law suit is a litigation which inevitably and necessarily involves the internal affairs of the defendant (50).
>
> * * * * * *
>
> "If I be right in thinking that the pending action hinges around and must turn on the internal affairs of the defendant then this court is authorized to decline to retain jurisdiction of it (*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130-1, and *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 105. Cf. *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 Fed. (2d) 111, 113)" (50, 51).

The pertinent clause of the debentures sued upon provides that:

> "So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows viz: * * * (the deleted matter refers to payments to senior security holders limited to 5% of principal amount) * * *, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * *" (8, 9).

The Issues on This Application.

1. That it is settled law that jurisdiction in cases involving the internal affairs of foreign corporations should be relinquished in favor of courts of the states where such corporations were organized and particularly that the jurisdiction was properly relinquished in this case to the courts of Wisconsin.

2. That this action involves the distribution of surplus earnings, analogous to dividends, of a foreign corporation, which is an internal affair and jurisdiction was properly declined.

POINT I.

The law is settled that jurisdiction in cases involving the internal affairs of foreign corporations should be relinquished in favor of the courts of the states where such corporations were organized.

The leading cases supporting the principle are:

Rogers v. *Guaranty Trust Company*, 288 U. S. 123 (1933);

Pennsylvania v. *Williams*, 294 U. S. 176 (1935);

Cohn v. *Mishkoff Costello Co.*, 256 N. Y. 102 (1931);

Goldstein v. *Lightner*, 266 App. Div. 357 (1st Dept. 1943), aff'd 292 N. Y. 670 (1944);

Strassburger v. *Singer Manufacturing Co.*, 263 App. Div. 518 (1st Dept. 1942);

Miesse v. *Seiberling Rubber Co.*, 264 App. Div. 373 (1st Dept. 1942);

Nothiger v. *Corrbon & Reynolds Corporation*, 266 App. Div. 299 (1st Dept. 1943), aff'd. 293 N. Y. 682 (1944).

In *Pennsylvania* v. *Williams*, *supra*, cited with approval in the later case of *Meredith* v. *Winter Haven*, 320 U. S. 228, Mr. Justice Stone said:

> "It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state."

The earlier case of *Rogers* v. *Guaranty Trust Co.*, *supra*, sets forth the same principle, also stating (p. 130):

> "When, by acquisition of his stock, plaintiff became a member of the corporation, he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the state in which it was organized."

The dissenting opinions in that case did not challenge the rule. They fully supported it. Mr. Justice Stone in his dissent, concurred in by Mr. Justice Brandeis, said (p. 144):

> "We may assume, without deciding, that neither a federal nor a state court of equity will, as a general rule, undertake to administer the internal affairs of a foreign corporation."

The Court's decision in the *Rogers* case was, as stated by Mr. Justice Stone, based on the contention that the case did not present a "problem of administration (of the corporation's internal affairs)." Judge Clark in *Cohen* v. *American Window Glass Company*, 126 Fed. (2d) 111 (C. C. A. 2nd, 1942), at page 113, makes the same point by stating:

> "Their (the dissenting Justices') quarrel was over the application of the rule to the case before them."

Likewise in *Kelley* v. *American Sugar Refining Co.*, 139 Fed. (2d) 76 (C. C. A. 1st, 1943), the Court said (p. 78):

> "* * * the strong dissenting opinions * * * (in *Rogers* v. *Guaranty Trust Co.*) leave the rule itself intact for application to a proper case."

The basis for the rule of noninterference with the internal affairs of a foreign corporation is set forth in *Overfield* v. *Pennroad Corporation*, 113 Fed. (2d) 6 (C. C. A. 3rd,

1940), cited by the petitioners, wherein the Court said (p. 12):

> "The reason the state court of equity declines to take jurisdiction of a suit involving the internal affairs of a foreign corporation is because the matter will require the exercise of visitorial power."

The *Overfield* case cited *Thompson* v. *Southern Connellsville Coke Co.*, 269 Pa. 500, 112 Atl. 533 (1921), wherein the Court said (p. 504):

> "* * * "* * The purpose of visitation is to supervise, direct, and control the management of the corporation": 14 *Corpus Juris*, 341, Art. 2198'
>
> * * * * * *
>
> "We are asked to construe a West Virginia statute regulating the internal management of corporations created in that state and involving a broad question of its public policy; our construction might not be in full accord with the views of the courts of that jurisdiction, in which event there would be presented to corporations there created, and doing business here, the anomalous and confusing situation that management in their home state is regulated in one way and here in another."

The petitioners contend that the fact that they reside in New York City and that some of the respondent's activities are there makes the Southern District of New York a more convenient place for trial. The opinion in *Rogers* v. *Guaranty Trust Company* in the lower court, reported in 60 Fed. (2d) 114, reveals that the foreign corporation therein involved had its principal office in New York City, where its chief executives were located and where its Board of Directors held its meetings and kept its corporate records, and yet jurisdiction in New York was declined.

In *Strassburger* v. *Singer Manufacturing Company, supra,* relied upon in the later case of *Goldstein* v. *Lightner, supra,* affirmed in 292 N. Y. 670, the complaint, included in the case on appeal therein, disclosed that the corporation involved was incorporated in a foreign state, New Jersey, that it had its main offices in New York, that it kept its books and records in New York, that it was managed by its officers and directors in New York and held its stockholders' and directors' meetings there and yet the New York Courts declined jurisdiction.

Whether or not the respondent's directors are amenable to process in Wisconsin is in no wise relevant. They are not made parties to the action. Judge Caffey, in the Court below, stated, as a reason why this case should be tried in Wisconsin, as follows:

> "Moreover, all the physical properties of the defendant (the respondent) which are operated and from which it derives earnings are located in Wisconsin, the State of its incorporation. It is there its main office and principal place of business are situated. There also its chief records are kept" (50).

Additional reasons which appealed to Judge Caffey in connection with his decision to decline jurisdiction were those stated in his opinion, and emphasized on page 11 of the petitioners' brief, (1) that the defendant (respondent) should not be put to the burden and expense of carrying on the litigation so far away as New York from its home state of Wisconsin, and (2) that when avoidable the full calendars of the District Court should not be crowded by a complicated cause of action which could better be tried in the forum of the domicile of the defendant (respondent) corporation.

However, these are merely reasons additional to the basic reason that the cause of action involved the internal management of a foreign corporation. The charge that Judge Caffey abused his discretion in declining jurisdiction in this case remains totally unsubstantiated.

The cases of *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157 (1881) and *Day* v. *Ogdensburgh and Lake Champlain R. R. Co.*, 107 N. Y. 129 (1887), cited by the petitioners, involved domestic and not foreign corporations. In *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163 (1893), the complaint was dismissed, the Court holding that the issue pertained to the discretion of the directors, an internal affair of the corporation. In *Prouty* v. *Michigan S. & N. Indiana R. R. Co.*, 1 Hun. 655 (N. Y. 1874), no jurisdictional question was raised.

POINT II.

This action involved the distribution of surplus earnings, analogous to dividends, of a foreign corporation, which is an internal affair and jurisdiction was properly declined.

The complaint, as described by the petitioners' attorney (page 3 of this brief) and the provisions of the said Class B Debentures (page 4 of this brief), coupled with the facts in the record that the respondent is a railroad corporation with its lines of railroad in Wisconsin (16), demonstrate that at the trial of the action on the merits, no matter in what forum such trial shall be held, the questions to be resolved must include a construction of the foregoing provisions of the Class B Debentures as to whether they grant discretion to the directors in any year

not to pay out to security holders the entire earnings of the Railroad for that year; also whether the opposite construction contended for by the petitioners, i.e., to require the railroad company to pay out to security holders every cent of its earnings in each year, would so impair its ability to perform the service required by law as a common carrier and public utility as to make any such contract void as against the public policy of the State of Wisconsin.

In support of this latter statement the language of this Court in the case of *New York etc. Railroad* v. *Nickals*, 119 U. S. 296 (1886), is very much in point. In that case, in construing the provisions of the contract between the corporation and its stockholders so as not to deprive the directors of discretion as to whether dividend distributions should be paid out in any year, the Court said (p. 304):

> "As was said by the court, in *Clearwater* v. *Meredith*, 1 Wall. 25, 40, 'when any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized.' The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock.
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> . . . . . .
>
> "A different view would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties. For, if preferred stockholders be-

come entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. * * * the former are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole."

The petitioners in their petition (4) assert that nothing more is involved in this litigation than an action in contract on an obligation made and to be performed in New York, the statement in their brief being to the effect that the securities (i.e., the Class B Debentures) which the petitioners "purchased", had their inception as valid obligations in New York and are there transferable and payable.

The facts are that the Class B Debentures are a very unusual type of security, the junior equity security issued by the respondent, a position normally occupied by common stock. The Class B Debentures are junior to the Class A Debentures and the so-called Common Stock (20). In the event of reorganization or sale, which is the only maturity date of the debentures (8), the holders are entitled to everything remaining after payment of the face amount of the Class A Debentures ($600,000) and the Common Stock ($2,500,000) (9). Therefore all restrictions on distributions of annual earnings deemed necessary for the best interests

of the Railroad operate to the ultimate benefit of the holders of the Class B Debentures.

Although distributions and any payments of principal are payable in New York City and although the Class B Debentures do bear a certificate of authentication by a New York agent, a customary requirement for securities listed on the New York Stock Exchange, they were originally issued in the year 1896 pursuant to a plan of reorganization of predecessor companies resulting from a foreclosure action in the Federal District Court in Wisconsin (20).

Thus, in connection with the questions presented on the application for a writ of certiorari, the Class A Debentures are analogous to First Preferred Stock, the Common Stock resembles Voting Second Preferred Stock and the Class B Debentures are a form of Non-Voting Common Stock.

In addition to the foregoing, there is another question involved in this litigation which is of importance for the Court to consider on the point made by petitioners that the District Court so abused discretion in its application of the rule *forum non conveniens* in declining jurisdiction as to warrant the granting of the writ applied for. This further question arises because the petitioners are necessarily attempting to obtain a construction of a provision of the Class B Debentures and the Articles of Incorporation which would be binding upon all of the debentureholders. The Class B Debentures are widely distributed among holders as is evidenced by the fact they are listed on the New York Stock Exchange (29).

It is to the best interests of these widely distributed holders of the securities and of the Corporation that this construction be determined by a single jurisdiction and

not by each of the many jurisdictions in which various holders reside. The natural and logical jurisdiction is Wisconsin, the state of incorporation of the respondent railroad corporation.

The majority opinion in this case in the Second Circuit Court of Appeals sets forth in part as follows (p. 779):

> "The provision for declaration and payment of sums due annually under the debentures, as well as the long continued practice under it for the many years in question, leave in no doubt, we think, that before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them. Instead of carrying a fixed rate of interest, the debentures promised, in lieu thereof, a contingent portion of the annual net earnings, this interest to be ascertained, fixed and declared in each year by the directors. According to the claim, the directors in each of the years but three fixed and declared, and the appellee paid the amounts determined to be due. If, therefore, support were needed for the view that the provision in the debentures, that the sums, if any, due were to be fixed and declared by the directors, meant just that, the long practise in accordance therewith and the long acquiescence of the debenture holders in that practise would provide it" (147 Fed. (2d) 777 (C. C. A. 2nd, 1945)).

The law is settled that actions to compel the payment of dividends or for similar relief involve the internal affairs of the corporation.

In the leading case of *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102 (1931), the plaintiff demanded judgment that the defendant, a foreign corporation, either redeem shares of its stock at par value or, in the alternative, declare a dividend out of its surplus. The Court, after stating the prin-

ciple that jurisdiction will not be taken to regulate the internal affairs of a foreign corporation, said (p. 105):

> "While it is not always easy to say when jurisdiction will be taken and when declined, and while contracts between a foreign corporation and its members will usually be enforced in the courts of this State, it seems clear that the jurisdiction now invoked must be declined under the principle stated."

In *Rogers* v. *Guaranty Trust Co., supra,* the plaintiff did not seek to compel the payment of distributions from surplus earnings, analogous to dividends, as in the case at bar. Even the dissenting justices in that case were of the opinion that a suit of that nature would involve the internal affairs of the corporation, for Mr. Justice Stone, in his dissenting opinion, concurred in by Mr. Justice Brandeis, said (p. 144):

> "But the case before us is, in this respect, unlike a suit to * * * compel the declaration of a dividend, *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102."

In *Cohn* v. *Mishkoff Costello Co., supra,* the Court gave the reason for declining jurisdiction, when it said:

> "* * * internal affairs * * * ought to be managed under the laws and by the direction of the courts of the State * * * where it is organized."

Overfield v. *Pennroad Corporation,* 113 Fed. (2d) 6 (C. C. A. 3rd, 1940), cited by the petitioners, elaborates upon the reasoning for declining jurisdiction by stating (pp. 12, 13):

> "Such (visitorial) power (the Court) * * * will not exercise over a foreign corporation, nor will it interfere in determining the rights or duties of the directors or officers of the corporation under the laws of a foreign jurisdiction. * * *

> "* * * an action * * * against a foreign corporation to 'recover the amount of certain dividends' which the plaintiff stockholders averred 'should have been declared and paid, upon the stock owned by them',—clearly a matter for corporate action subject to the requirements and limitations of the laws of the state of the corporation's domicile."

In *Thompson* v. *Southern Connellsville Coke Co.*, 269 Pa. 500, 112 Atl. 533 (1921) cited in the *Overfield* case, *supra*, the Court said (p. 503):

> "Where the act * * * affects the complainant solely in his capacity as a member of the corporation * * * as stockholder * * * and is the act of the corporation * * * through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction."

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y., July 13, 1945.

Respectfully submitted,

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